
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

Case No: 93-ERA-29

In the Matter of.

ADOLPH R. DEMLONG
Complainant,

v.

ARIZONA PUBLIC SERVICE CO.,
Respondent

ORDER OF DISMISSAL

The Employment Standards Administration/Wage and Hour Division (ESA) received a complaint from Complainant on April 15, 1993. The complaint alleged that Respondent discriminated against Complainant when it gave him a poor rating and subsequently denied a merit increase as a result of protected activity. Respondent, in a letter dated May 19, 1993, generally denied the allegations set forth in the complaint. An affidavit from Gregg Overbeck, a director of the PVNGS Nuclear Engineering Department, summarizing his knowledge of the circumstances surrounding the allegations set forth in the Complaint, was also attached to this letter. The ESA conducted a fact-finding investigation and found that Complainant's allegations could not be substantiated as they found no evidence that the rating Complainant received and the subsequent denial of a merit increase was the result of any protected activity in which Complainant was a party. Complainant, on May 19, 1993, sent a telegram to this Office requesting a hearing.

On June 7, 1993, Complainant filed a Notice of Voluntary Dismissal. Complainant cites Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure and orders of the Secretary of Labor (SOL) which govern the procedure for voluntary dismissal of claims by complainants in cases arising under § 21 of the Energy Reorganization Act (ERA) in support of this Notice. Pursuant to Rule 41(a)(1)(i), a complainant may voluntarily dismiss an action, without order of court, before an answer or a motion for summary judgement is filed by respondent. Complainant contends that neither an answer nor a motion for summary judgement has been filed by Respondent in this proceeding. Further,

Complainant argues that voluntary dismissal without prejudice is consistent with past practice of the Department of Labor in other ERA cases, citing Reece v. Detroit Edison, 92-ERA-1, slip op. of SOL at p.2 (Apr. 9, 1992) (this office, pursuant to Rule 41, cancelled the scheduled hearing end granted Complainant's Motion to Dismiss without prejudice), as support. This Office, on June 11, 1993,

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then issued an order instructing Respondent to file any responses it may have to Complainant's Notice of Voluntary Dismissal within 10 days. Respondent complied by sending a response on June 21, 1993, requesting that this Office issue an Order of Dismissal With Prejudice. Respondent also cites Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure to support its contention that Complainant should not be permitted to dismiss the action without prejudice. Respondent contends that its response to ESA, dated May 3, 1993, was the functional equivalent of an answer, and therefore, Complainant should not be allowed to invoke Rule 41(a)(1)(i) to voluntarily dismiss the claim. Moreover, Respondent argues, the proper focus of Rule 41(a)(1)(i) is upon the respondent and his interests and the likely prejudice to the respondent if a dismissal without prejudice is granted. Here, Respondent further contends it would be legally prejudiced if this claim were dismissed without prejudice as the merits have been considered and determined by the United States Department of Labor, (ESA's initial determination of May 14, 1993).

Respondent's contentions are without merit under these circumstances as Rule 41(a)(1)(i) requires that Respondent file either an answer or a motion for summary judgement before Complainant is precluded from voluntary dismissal of the claim without prejudice. The complaint filed by Complainant with ESA on April 15, 1993, is not a "complaint" under the ALJ Rules of Practice, which defines a "Complaint" as "any document initiating an adjudicatory proceeding.... " 29 C.F.R. § 18.2(d). A complaint filed with ESA simply initiates an investigation. 29 C.F.R. § 24.4. Because ESA is responsible only for investigating Complainant's initial accusations and making a finding based on its investigation, the claim is considered to be at the investigatory and not the adjudicatory level, as no hearing is yet afforded to the parties. Id. Further, because no hearing has been held and the merits have not been fully adjudicated within the context of Rule 41(a)(1), legal prejudice to Respondent does not exist. A hearing is initiated after a request for a hearing by telegram is received by the Chief Administrative Law Judge. 29 C.F.R. § 24.4(d)(2). See Gregory v. Brown & Root, Inc., 85 ERA 1 at 11 (March 4, 1985). It is at this point that the claim enters the adjudicatory level.

An answer occurs where Respondent contests any material fact alleged in a complaint, and includes "a statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation [set forth in the complaint]..." 29 C.F.R. § 18.5(d). Since no document has been filed before this office which would be considered the functional equivalent of an answer, Rule 41(a)(1)(i) allows Complainant to voluntarily dismiss the claim at this time.

ORDER

In light of the foregoing, IT IS HEREBY ORDERED that:

1. Complainant's Motion to Dismiss the claim is GRANTED, Without Prejudice.

James Guill
Associate Chief Judge

At Washington, D.C.
Entered: August 20, 1993

JLG/laa